Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Related to Retransmission Consent	)	MB Docket No. 10-71
	)	
	)	

REPLY COMMENTS OF PUBLIC KNOWLEDGE AND THE NEW AMERICA FOUNDATION

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Public Knowledge and the New America Foundation ("PK and NAF") respectfully submit these reply comments in response to the *Notice of Proposed Rulemaking* released in the above-captioned docket. PK and NAF oppose a proposed rule that MVPDs must give notice to subscribers in the event of a potential programming blackout, and disagree with commenters that assert that the Cable Act prevents the Commission from adopting mechanisms to ensure fair retransmission consent negotiations. In addition, PK and NAF argue that 1) their proposed interim carriage system will not hurt local broadcasters; 2) the Commission has authority to reevaluate earlier determinations on the validity of program "tying" arrangements, and 3) the proposed requirement of mandatory arbitration need not pose undue burdens on broadcasters or MVPDs.

I. REQUIRING THAT BROADCASTERS AND MVPDS GIVE NOTICE TO SUBSCRIBERS PRIOR TO A BLACKOUT MERELY CREATES PANIC AND DOES NOT FURTHER NEGOTIATIONS OR ADVANCE THE PUBLIC INTEREST.

PK and NAF support Time Warner Cable's assertion that requiring MVPDs to give notice to consumers "at least 30 days before the end of a retransmission agreement term if a new agreement has not been reached"[1] would be counterproductive.[2] Simply providing viewers with advance notice of every potential impasse would do nothing to prevent the consumer harms caused by increasingly frequent programming blackouts, and might actually lead to greater consumer frustration and confusion—and ultimately more costly and unnecessary switching among video providers.[3] Furthermore, if a notice requirement were adopted, broadcasters would

[1] Comments of LIN Television Corporation, *Amendment of the Commission's Rules Related to Retransmission Consent*, 25, MB Docket No. 10-71, May 27, 2011, *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021673818.
[2] Time Warner Cable Inc. Reply Comments, MB Docket 10-71 at 16 (Jun. 3, 2011).
[3] *See* Steven C. Salop, Tanseem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury, *Economic Analysis of Broadcasters' Brinskmanship and Bargaining Advantages in Retransmission Consent Negotiations*, at

be increasingly likely to use threats to go dark as part of their negotiations, and MVPDs would face increased pressure either to agree to unreasonable rates or to give notice of a potential blackout to consumers. Considering the damage MVPDs would face if they were perceived as responsible for the blackout (even if in reality, the *broadcasters* were actually responsible for the breakdown in negotiations), many MVPDs would choose to agree to unfair and unreasonable prices in the eleventh hour of negotiations. Such a change could hardly be seen as an "improvement" to the retransmission consent negotiation process.[4]

Amplifying the threat of a blackout during negotiations does nothing to avoid the blackout itself, or to resolve the underlying dispute, whereas it could needlessly induce subscribers of one MVPD to switch to another provider. Notice during the period when the parties are moving into deadline-driven negotiations may well prove an effective weapon for one company to deploy against the other, but for consumers it's likely to do more harm than good. Consumers caught in the middle of a retransmission consent dispute may perceive they have no choice but to leave their MVPD and incur switching costs or risk losing the programming they value. Worse, most consumers will incur this cost for no reason, since an eleventh-hour settlement typically maintains the *status quo*. The average consumer has no context or objective source of information sufficient to realize that in the vast majority of cases the parties are posturing and a settlement will obviate the need to take costly measures to ensure carriage. Many consumers will incur costs to switch, only to receive notice months later that their new MVPD will be blacked out by the same or another local broadcaster. Moreover, since many consumers select their MVPD because of the overall quality or value of a bundle of services of

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11-16 (June 3, 2010) attached to the Reply Comments of Time Warner Cable, Inc., MB Docket 10-71 (filed June 3, 2010).

[4] *See* Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, MB Docket 10-71, at ¶ 3 (March 3, 2011), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0303/FCC-11-31A1.pdf.

which Internet access is increasingly important, a notice that leads them to unnecessarily switch ISPs may also leave them with lower quality or more expensive Internet or phone service. The time and effort that consumers must expend to investigate alternatives, to switch MVPDs, or to attempt over-the-air reception is an unnecessary opportunity loss as well.

II. THE CABLE ACT DOES NOT PREVENT THE COMMISSION FROM ENSURING FAIR NEGOTIATIONS BETWEEN MVPDS AND BROADCASTERS.

PK and NAF wish to correct the following misinterpretations regarding the purpose of the Cable Act:[5] first, that the Act was designed solely to prevent cable companies from passing on high rates to consumers, and second, that Congressional intent was for the Commission not to interfere in retransmission consent negotiations.

Disney has asserted:

> Congress enacted Section 325(b)(3) not to regulate retransmission consent negotiations, but to keep cable companies from further adding to their profits by passing through the first wave of retransmission consent fees to subscribers.

This is a misreading of the legislative history. The purpose of the Cable Act was not merely to regulate MVPD conduct, but also to prevent consumer harm. The Act specifically instructed the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier," and "to ensure that the rates . . . are reasonable."[6] Congress was aware of the risks presented by retransmission consent negotiations, and wanted ultimately to ensure that negotiations would result in reasonable rates for consumers. There are obviously two parties to these negotiations. It is therefore inaccurate to prescribe to Congress a singular intent to regulate MVPD conduct through the Cable Act - the

[5] *See* 47 U.S.C. § 325.
[6] 47 U.S.C. § 325(b)(3)(A).

goal of the Act was to protect *consumers* from unreasonable cable rates, whether they were a result of unfair negotiation practices of cable companies *or* of broadcasters.

Disney has also asserted that the Commission should not incorporate substantive standards within the good faith requirement because doing so would "contradict Congress's overarching decision to allow 'the parties to resolve through their own interactions and through the efforts of each to advance its own economic self interest.'"[7] While Congress did intend for retransmission consent agreements to be created through negotiations, 325(b)(1)(A) is not a declaration of Congress's intent to leave broadcasters and MVPDs alone in their negotiations and let the free market decide rates. As mentioned before, Congress was aware of the need to ensure that retransmission consent negotiations did not adversely impact the public.[8] Therefore, it gave the Commission authority to make rules to govern these negotiations.[9] Broadcasters and MVPDs ought to be able to create fair rate agreements without the Commission's intervention. However, if conflict between broadcasters and MVPDs threatens to injure the public, 325(b)(1)(A) should not be read as a bar preventing or limiting FCC involvement. The bottom line is that consumers shouldn't face *any* danger of losing access to local programming, which is precisely why Congress enacted the 1992 Cable Act in the first place.[10]

Furthermore, contrary to NAB's suggestion, PK and NAF do not suggest that "the Commission must regulate the rates" of broadcast channels.[11] Rather, we urge the Commission to ensure that retransmission consent negotiations are conducted in a manner that protects consumers because they are fair to both broadcasters and MVPDs.

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[7] Disney Reply Comments at 5.
[8] *See* § 325(b)(3)(A).
[9] *Id.*
[10] *See* S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 (stating that retransmission consent was initially designed to "advance[] the public interest" served by broadcasters by correcting for "a distortion in the video marketplace which threatens the future of over-the-air broadcasting").
[11] *See* NAB Broadcasters Reply Comment, MB Docket 10-71, at 30 (Jun. 3, 2011).

III. UNDER THE INTERIM CARRIAGE SYSTEM PK AND NAF HAVE PROPOSED, CONTENT PROVIDERS SUCH AS NATIONAL FOOTBALL LEAGUE NEED NOT WORRY ABOUT LOCAL BROADCASTERS BEING UNABLE TO PAY FOR PROGRAMS.

The National Football League ("NFL") has expressed its concern that adopting an interim carriage mechanism would hurt local broadcasters' profits and inhibit their ability to broadcast NFL programs.[12] This fear is unfounded. Under the rules PK, NAF and the other commentators have proposed, a broadcaster would still be paid for the programs broadcast during the interim carriage period. Contracts for carriage of major sporting events are in place long before a retransmission dispute arises and also assume that the event will actually be televised to the broadcasters' entire audience. There is therefore no reason to believe the compensation received by the broadcast station would not be identical to the pre-existing arrangement and continue until a new agreement is reached.[13] On the other hand, allowing the *current* system to continue only increases the likelihood that a negotiations breakdown will interrupt an NFL broadcast and deprive consumers of programming they paid for.

IV. THE COMMISSION'S EARLIER DETERMINATIONS DO NOT PREVENT IT FROM RE-EVALUATING ITS CURRENT STANDARDS REGARDING PROGRAM "TYING" AGREEMENTS.

NAB points out that the Commission has, in the past, presumed that program "tying" agreements for the distribution of channel packages were the result of legitimate negotiating tactics.[14] While this assertion is true, the Commission's previous determination does not prevent

[12] *See* National Football League, Reply Comments, MB Docket 10-71, at 2 (Jun. 3, 2011) ("[T]he retransmission consent process that Congress put in place is critical to the health of the broadcast industry.").
[13] Public Knowledge, et. al., *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB 10-71, at 36 (March 9, 2010).
[14] Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *First Report and Order*, 15 FCC Rcd 5445 (2000) ("Good Faith Order"), at ¶ 56.

it from reevaluating these "tying" agreements. The Supreme Court has held that the Commission may reverse its earlier determinations if "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better . . . ."[15] PK, NAF and other commenters have already explained the statutory basis for the Commission's authority, and the record contains ample evidence of the abuses that have resulted from the current retransmission consent regime, as well as the dangers posed by program tying agreements.[16] As a result the commission must reevaluate tying agreements. As suggested by Cablevision Corporation,[17] it must find that such agreements are a *per se* violation of the good faith requirements.[18]

V. MANDATORY ARBITRATION IS A NATURAL AND COMMON SOLUTION IN MANY COMMERCIAL DISPUTES, AND NEED NOT POSE UNDUE BURDENS ON BROADCASTERS OR MVPDS.

NAB points to the perceived costs of the ensuing legal struggles if arbitrations become the norm.[19] These complaints ignore the fact that arbitration is a natural and common solution in many commercial disputes involving bilateral monopolies, and that arbitration need only exist as a last resort when negotiations break down.

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[15] *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009), *cited in Cablevision Sys. Corp. v. FCC*, 2011 U.S. App. LEXIS 11697 at *34 (D.C. Cir. June 10, 2011).

[16] *See* Public Knowledge and New America Foundation Comments, MB Docket 10-71, at 6 (May 27, 2011). *See also* Notice of Proposed Rulemaking, at ¶ 23; Comments of American Cable Ass'n, *2010 Quadrenial Review*, MB Docket No. 09-182 (filed July 12, 2010), at 11-19; Michael L. Katz, Jonathan Orszag & Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, Nov. 12, 2009, attached to the Comments of the National Cable and Telecommunications Association, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269 (filed Dec. 16, 2009), at 30.

[17] Comments of Cablevision Corporation, *Amendment of the Commission's Rules Related to Retransmission Consent*, 15, MB Docket No. 10-71, May 26, 2011, *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021657133.

[18] PK and NAF agree with Cablevision that transparency of retransmission consent agreements, nondiscrimination and a prohibition on tying arrangements are three critical factors in determining whether the negotiating parties have acted in good faith.

[19] NAB Reply Comments, MB docket 10-71, at 34-35 (Jun. 3, 2011) ("Arbitration would simply result in a battle between dueling economists and lawyers [regarding the fair market value of the transmission.]").

When two parties cannot feasibly exist without the other but cannot agree on the fair market value of their services, arbitration reliably provides a workable compromise. This type of system is the norm in Major League Baseball, for instance, where players and teams frequently have to negotiate yearly salaries.[20] The baseball industry understands that disputes over player salary can disrupt gameplay, and arbitration is therefore necessary to ensure agreements are made.

Additionally, arbitration will not need to be invoked in all programming negotiations. Arbitration would only exist as a backstop for when broadcasters and MVPDs fail to reach satisfactory outcomes in negotiations. If arbitration does turn out to be as costly as is feared, both MVPDs and broadcasters will have an incentive to come to agreements quickly and fairly. Lastly, if the terms of both arbitrations and retransmission consent agreements[21] are made public, it will be easier and less costly to agree upon new rates every three years when the contracts are renewed.

CONCLUSION

The public's uninterrupted access to their local broadcast channels over any MVPD should be ensured to the greatest extent feasible. Consumers want to choose video and broadband providers based on price, quality and services offered, not because they may lose access to a local broadcast channel in advance of a major televised event. While reasonable compensation to broadcast licensees can help to support the continuation of localism in programming, it is also important to keep in mind that the public's access to "free" (ad-

[20] Mike Scarr, *24 Players Offered Salary Arbitration*, MLB.com (Dec. 2, 2008), http://mlb.mlb.com/news/article.jsp?ymd=20081202&content_id=3698166&vkey=hotstove2008.
[21] *See* Comments of Cablevision Corporation, *Amendment of the Commission's Rules Related to Retransmission Consent*, 13, MB Docket No. 10-71, May 26, 2011, *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021657133.

supported) local programming is the central *quid pro quo* required of the broadcast industry in exchange for an annual multi-billion dollar subsidy of virtually free use of some of the most economically valuable bands of public spectrum.

Respectfully submitted,

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